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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

LARRY ALLEN,

Defendant and Appellant.

D072194

(Super. Ct. No. SCD268539)

APPEAL from a judgment of the Superior Court of San Diego County, Peter L. Gallagher, Judge. Affirmed and remanded for resentencing.

Sylvia W. Beckham, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and Eric A. Swenson, Deputy Attorney General, for Plaintiff and Respondent.

Larry Allen appeals his jury-tried convictions for assault with a deadly weapon (Pen. Code,¹ § 245, subd. (a)(1); count 1) and battery (§ 242; count 2), as a lesser included offense of assault with a deadly weapon. On count 1, the jury also found that Allen personally used a deadly weapon within the meaning of section 1192.7, subdivision (c)(23). Subsequently, the court found that Allen had two serious felony and strike convictions and that he served five prior prison terms. The court sentenced Allen to 15 years in prison, 10 years of which was imposed under section 667, subdivision (a)(1) for the two prior serious felony convictions.

On appeal, Allen contends the trial court prejudicially erred by failing to instruct on the defense of necessity. Alternatively, he contends his trial attorney rendered prejudicially ineffective assistance by failing to request an instruction on the necessity defense. In a prior opinion, we rejected Allen's arguments and affirmed his convictions. Subsequently, the California Supreme Court denied Allen's petition for review. (*People v. Allen* (July 11, 2018, D072194), review denied (Sept. 19, 2018, S250569).)

After we issued the remittitur, but before time lapsed for Allen to file a petition for a writ of certiorari in the United States Supreme Court, Allen filed a motion to recall the remittitur to address the effect of Senate Bill No. 1393, effective January 1, 2019, which

¹ Undesignated statutory references are to the Penal Code.

gives the trial court discretion to dismiss, in the furtherance of justice, five-year prior serious felony enhancements under section 667, subdivision (a)(1).²

After the People failed to oppose Allen's motion to recall the remittitur, we granted the motion, reinstated the appeal, and provided the parties an opportunity to submit supplemental briefing addressing the applicability of Senate Bill No. 1393 to Allen's case. As such, the case is now in the same position as if no appeal had been decided. (See *People v. Rivers* (1967) 66 Cal.2d 1000, 1007 (dis. opn. of Peters, J.).)

Allen contends, and the Attorney General agrees, that Senate Bill No. 1393 will apply to parties, like Allen, whose appeals are not final on the law's effective date, January 1, 2019. However, the Attorney General contends resentencing is unwarranted in this case because the record shows the trial court would not have stricken the enhancements even if it had the discretion to do so. We disagree and, therefore, will again affirm Allen's convictions, but remand to provide the trial court an opportunity to exercise its discretion under Senate Bill No. 1393.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The People's Case*

The events leading to Allen's convictions occurred at an apartment building in a "pretty rough" neighborhood in San Diego. A.I. lived in one of the apartments that

² To be distinguished is a situation where a defendant seeks to recall a remittitur because of a change in law after the appeal is *final*. (See *People v. Harris* (2018) 22 Cal.App.5th 657, 661.)

overlooked a courtyard. M.P. and her three adult sons (Sergio, Joe, and Fernando) also lived in one of the apartments.

One night in August 2016, A.I. awakened when he heard loud banging and men yelling, "[H]urry up. Grab the sticks. Get something." Looking outside, A.I. saw four men breaking a wood fence. One man had a metal baseball bat. Two men slowly ascended stairs leading to M.P.'s apartment. It appeared they were waiting for someone in front of them, Allen, to go up first.

Allen banged on the door of M.P.'s apartment. At about the same time, the men in the courtyard and stairway yelled, "Come on. Get him. Go. Go. Go. What's up with the PCP?" When Sergio and Joe opened the door, Allen pushed his way in, saying, "Let me in. Let me in. They're trying to kill me." "Let me in, motherfucker." Allen was frantic and sweating.

Joe and Sergio stood shoulder-to-shoulder, blocking the entrance. Sergio told Allen to stay out "because whatever trouble he's bringing, I don't want my family to get involved" Joe told Allen, "Get out. You can't come in." But Allen forced his way inside. Sergio and Joe hit Allen in an attempt to eject him. Allen fought back, striking Sergio on the head with a baseball bat. Joe hit Allen with a chair. Allen struck M.P.'s head with a wooden stick. Joe and Sergio wrestled Allen to the kitchen floor. Allen was bleeding and lost consciousness. Joe and Sergio kicked Allen until he finally got up, and then they shoved Allen out the door. As Joe and Sergio shut the door, Allen unsuccessfully tried to hit them with a stick.

Once outside, Allen tried to open the door of another apartment. Looking through the peephole, the occupant saw Allen, who was "full of blood" and leaning against her door, with his hand on the doorknob. She called police, who were already on their way after receiving A.I.'s call about the commotion.

When police arrived, the men A.I. had seen in the courtyard had fled. Police apprehended Allen, who was walking out of the apartment complex. They ordered him to stop several times before he complied.

Joe fractured his hand during the fight. Sergio sustained a small bump on the head. M.P. required five sutures to close a head wound.

B. The Defense Case

Allen did not testify and he called no witnesses. In closing argument, his attorney argued that the People had not met their burden of proving assault with a deadly weapon because there was no evidence Allen entered the apartment with a bat or stick. He also argued that Joe must have accidentally inflicted the head injury on M.P. when attempting to strike Allen.

C. Jury Question About Self-Defense

The court instructed the jury with standard instructions on assault with a deadly weapon and the lesser included offense of battery. The court also instructed the jury with section 198.5 regarding an occupant's right to forcibly eject a trespasser, which states:

"Any person using force, intended or likely to cause death or great bodily injury, within his or her residence, shall be presumed to have held a reasonable fear of imminent peril of death or great bodily injury to self, family, or a member of the household, when that force is used against another person, not a member of the family or

household, who unlawfully and forcibly enters or has unlawfully and forcibly entered the residence and the person using the force knows or had reason to believe that an unlawful and forcible entry occurred. [¶] As used in this section, great bodily injury means a significant or substantial physical injury."

Allen's attorney did not ask the court to instruct on self-defense, and the court did not instruct on self-defense on its own initiative.

During deliberations, the jury asked the court, "Did [Allen] have the right to use force to defend himself if he was attacked once he entered the apartment?" Recognizing that the jury's question could not be answered with a simple yes or no, the court stated it would instruct on the right to eject a trespasser and the right of self-defense, and then permit counsel to argue self-defense to the jury. Both attorneys agreed with this approach.

The court reinstructed the jury with CALCRIM No. 875, but this time defined assault with a deadly weapon to include the element that Allen was not acting in self-defense. The court similarly reinstructed with CALCRIM No. 960 on battery. The court also instructed with a modified version of CALCRIM No. 3475 regarding the occupant's right to use force against a trespasser:

"The owner or occupant of a home may request that a trespasser leave the home. If the trespasser does not leave within a reasonable time and it would appear to a reasonable person that the trespasser poses a threat to the home or the owner or occupants, the owner or lawful occupant may use reasonable force to make the trespasser leave. [¶] *Reasonable force* means the amount of force that a reasonable person in the same situation would believe is necessary to make the trespasser leave. [¶] If the trespasser resists, the owner or lawful occupant may increase the amount of force he or she uses in proportion to the force used by the trespasser and the threat the trespasser poses to the property. [¶] When deciding whether

reasonable force was used, consider all the circumstances as they were known to and appeared to the owner or occupants and consider what a reasonable person in a similar situation with similar knowledge would have believed." (Original italics.)

The court also instructed with a modified version of CALCRIM No. 3476, stating:

"The owner or possessor of real property may use reasonable force to protect that property from imminent harm. A person may also use reasonable force to protect the property of a family member from immediate harm. [¶] *Reasonable force* means the amount of force that a reasonable person in the same situation would believe is necessary to protect the property from imminent harm." (Original italics.)

In addition to re-reading the instruction on section 198.5, the court also instructed with a modified version of CALCRIM No. 3470, stating in part that "self-defense is a defense to the crimes charged" and that Allen "is not guilty of those crimes if he used force against another person in lawful self-defense." On the People's request, the court modified CALCRIM No. 3470 to also state, "If the entry was unlawful, [Allen] had a duty to retreat provided he had the opportunity to do so."³ The court also instructed with CALCRIM No. 3471 (right to self-defense: mutual combat or initial aggressor) and CALCRIM No. 3472 (right to self-defense: may not be contrived).

Approximately one hour after receiving these additional instructions and hearing counsels' arguments on them, the jury returned guilty verdicts.

³ This modification was based on *People v. Hardin* (2000) 85 Cal.App.4th 625, 634.

DISCUSSION

I. *THE COURT DID NOT ERR IN FAILING TO INSTRUCT ON THE DEFENSE OF NECESSITY*

A. *Introduction*

"In general, if an owner/occupant lawfully uses force to defend himself against aggression by a trespasser, then the trespasser has no right to self-defense against the owner/occupant's use of force." (*People v. Johnson* (2009) 180 Cal.App.4th 702, 709-710.) Accordingly, the court instructed the jury that Allen's right to self-defense was limited. If his entry into the apartment was "unlawful," then his right to self-defense was contingent on him retreating "provided he had the opportunity to do so."

On appeal, Allen contends this instruction "begged the further question[], what if the entry was not unlawful?" Allen asserts that if he entered M.P.'s apartment lawfully, then he had a right to self-defense without retreating. Although conceding that he "violated the law by forcing his way into the apartment," Allen contends the jury could have found that his trespass was excused (i.e., was lawful) by the defense of necessity. He asserts that once the trial court determined to instruct on self-defense, the court was obligated to give complete instructions, including one on necessity. Without that, Allen contends the instructions "undermined the possibility that the jury would find [he] acted in lawful self-defense." Because Allen's attorney did not ask for such an instruction, Allen frames the issue as either the court's error in failing to instruct on the defense of necessity sua sponte or his lawyer's ineffective assistance in not requesting that instruction.

B. The Court Had No Sua Sponte Duty to Instruct on Necessity

"[A] defendant has a right to have the trial court, on its own initiative, give a jury instruction on any affirmative defense for which the record contains substantial evidence [citation]—evidence sufficient for a reasonable jury to find in favor of the defendant [citation]—unless the defense is inconsistent with the defendant's theory of the case." (*People v. Salas* (2006) 37 Cal.4th 967, 982.) "In determining whether the evidence is sufficient to warrant a jury instruction, the trial court does not determine the credibility of the defense evidence, but only whether 'there was evidence which, if believed by the jury, was sufficient to raise a reasonable doubt.'" (*Ibid.*) On appeal, we determine de novo whether the trial court had a sua sponte duty to instruct on a defense. (*People v. Russell* (2006) 144 Cal.App.4th 1415, 1424, disapproved on other grounds by *People v. Covarrubias* (2016) 1 Cal.5th 838, 874, fn. 14.)

"The necessity defense is very limited and depends on the lack of a legal alternative to committing the crime. It excuses criminal conduct if it is justified by a need to avoid an imminent peril and there is no time to resort to the legal authorities or such resort would be futile.' [Citation.] 'By definition, the necessity defense is founded upon public policy and provides a justification distinct from the elements required to prove the crime.' [Citation.] 'Necessity does not negate any element of the crime, but represents a public policy decision not to punish such an individual despite proof of the crime.'" (*People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1164 (*Verlinde*), disapproved on other grounds in *People v. Cook* (2015) 60 Cal.4th 922, 939.)

"To justify an instruction on the defense of necessity, a defendant must present evidence sufficient to establish that [he] violated the law (1) to prevent a significant and imminent evil, (2) with no reasonable legal alternative, (3) without creating a greater danger than the one avoided, (4) with a good faith belief that the criminal act was necessary to prevent the greater harm, (5) with such belief being objectively reasonable, and (6) under circumstances in which [he] did not substantially contribute to the emergency.'" (*Verlinde, supra*, 100 Cal.App.4th at pp. 1164-1165; see also CALCRIM No. 3403.)

An instruction on the defense of necessity is only required where there is substantial evidence from which a reasonable jury could find *each* element of the defense. (*Verlinde, supra*, 100 Cal.App.4th at p. 1165 [no substantial evidence of fourth and fifth elements]; *People v. Miceli* (2002) 104 Cal.App.4th 256, 267 ["Defendant failed to show substantial evidence in support of the second and fifth elements [of the defense]; thus, he was not entitled to instruction on necessity."].) Thus, if the evidence is insufficient with respect to any one of the elements of the necessity defense, the court correctly refuses to instruct on this defense.

Even viewing the evidence in the light most favorable to Allen, the court correctly did not instruct on the defense of necessity. That defense cannot be invoked "when it is the culpable conduct of the actor that creates or contributes to the atmosphere of necessity." (*Verlinde, supra*, 100 Cal.App.4th at p. 1165.) Although Allen demanded to be let inside the apartment stating, "They're trying to kill me," there was no evidence that Allen did not substantially contribute to that emergency. Allen did not testify. None of

the men chasing him testified. There is no evidence explaining *why* Allen was being chased (assuming that he was being chased), except A.I.'s testimony that men in the courtyard were yelling, "What's up with the PCP?"—a vague statement suggesting the incident had some connection with that drug. There is no evidence showing whether Allen engaged—or did not engage—in confrontational conduct likely to incite anger or a forcible response by the men chasing him. With no evidence showing that Allen did not substantially contribute to the emergency, the evidence did not support instructing on the defense of necessity. (See *People v. Haynes* (1991) 223 Ill.App.3d 126, 128 [584 N.E.2d 1040, 1042] [where defendant forced his way into a residence to avoid being beaten, court properly refused to instruct on defense of necessity because "nothing in the record points to who allegedly was pursuing defendant or why he was being pursued. Accordingly, nothing confirms defendant was without blame in occasioning or developing the situation."].)

Disagreeing with this analysis, Allen contends "[t]here is no indication that [he] substantially contributed to that emergency." However, as Allen acknowledges, the defendant has the burden of establishing this affirmative defense by a preponderance of the evidence. (*People v. Heath* (1989) 207 Cal.App.3d 892, 901.) To require the court to instruct on this defense, it is Allen's burden to show substantial evidence supports a finding in his favor on each element of this defense. The issue is whether there is substantial evidence showing that Allen did not contribute to the emergency—and for the reasons stated *ante*, the answer to that question is no.

Allen also asserts "[s]ubstantial evidence is present here because the record points to who was allegedly pursuing [Allen], i.e., the other armed men in the courtyard and on the stairwell." He also asserts there is substantial evidence showing "why" he was being chased—"those armed men were trying to kill [him]." However, these arguments fail because evidence that a group of unidentified men were pursuing Allen does not inform about *who* they were and, more importantly, *what* they were doing there and *why* they were trying to injure or kill him. On this record, determining why Allen was being chased and what, if anything, he did to contribute to that exigency is pure speculation. "Speculation is not substantial evidence." (*People v. Wallace* (2017) 15 Cal.App.5th 82, 93.)

Moreover, even assuming without deciding that substantial evidence revealed that Allen did not substantially contribute to the exigency, we would still reject his argument because there was no substantial evidence to establish the second element of the necessity defense—that Allen had no reasonable legal alternative to forcing entry into M.P.'s apartment. Allen asserts, "There was no conceivable reasonable legal alternative, other than perhaps barging into someone else's apartment"; however, there is no evidence about what other escape routes existed, if any. There is no evidence that Allen's choices were solely limited to being attacked by the men in the courtyard or getting inside M.P.'s home. Allen's greeting, "Let me in, motherfucker," does not explain or shed any light on whether Allen was unable to avoid the men or summon help in any other manner. (See *People v. Kearns* (1997) 55 Cal.App.4th 1128, 1135 (*Kearns*) [defendant failed to establish the absence of reasonable legal alternatives].)

Accordingly, because there is no substantial evidence in the record with respect to at least two of the required elements of the necessity defense, the court did not err in failing to instruct sua sponte on this defense.⁴

II. *NO INEFFECTIVE ASSISTANCE OF COUNSEL*

Allen also contends his trial attorney provided ineffective assistance by failing to request an instruction on the defense of necessity. However, our conclusion that the record lacks substantial evidence to support giving such an instruction defeats this argument. (*Kearns, supra*, 55 Cal.App.4th at p. 1135 [rejecting claim that trial counsel provided ineffective assistance by failing to request necessity instruction because "Kearns's evidence was insufficient to permit a reasonable jury to find that [the] elements [of the necessity defense] were established and thus neither the trial court nor defense counsel committed error"]; *People v. Pepper* (1996) 41 Cal.App.4th 1029, 1038 ["Since [the] defense[] of necessity . . . w[as] not available to defendant as a matter of law, we reject his related claim[] that . . . he received ineffective assistance of counsel when his trial attorney did not request instruction on the defense[] to which we have concluded he was not entitled."].)

⁴ Allen also frames the same argument slightly differently, asserting that the court abused its discretion by answering the jury's question about self-defense without also instructing on the defense of necessity. However, the analysis is the same. Because the record contains no substantial evidence to support giving that instruction, the court did not abuse its discretion by failing to instruct on necessity as part of the self-defense instructions.

III. SENTENCING ISSUES

A. Additional Background

After the jury returned its verdicts, the court found that Allen suffered two prior serious felony and strike convictions and served five prior prison terms.

At sentencing, the court stated the case "kind of troubled me in some ways" because Allen did not target the victims, was being chased, and did not enter the victims' apartment "with criminal intent to beat people up" However, the court also recognized the seriousness of entering someone else's home and that Allen has "a miserable, miserable criminal record. There are strikes. There are prison priors. There are enhancements."

The court stated that it had in mind a "range of sentencing" that was appropriate "for the interest of justice and what I think this case is and the value of this case." To reach that result, the court first determined to impose the low term (two years) for assault because the victims were not targeted and "this was more of a happenstance" Next, under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, the court dismissed one of the prior strikes (a 1997 conviction) because it arose out of a "substance-induced" family fight that had not since been repeated. As a result, the low term was doubled to four years. Under then-existing law, the court was required to, and did, impose a five-year consecutive term for each of the two prior serious felony convictions. Last, the court exercised its discretion to strike four of the five prior prison term enhancements under section 667.5, subdivision (b), resulting in a total sentence of 15 years in prison.

B. *Prior Serious Felony Enhancement*

Effective January 1, 2019, Senate Bill No. 1393 amends sections 667 and 1385 to give the trial court discretion to dismiss, in the interest of justice, five-year prior serious felony enhancements under section 667, subdivision (a)(1). (*People v. Garcia* (2018) 28 Cal.App.5th 961, 971 (*Garcia*).) Under the versions of those statutes applicable when the court sentenced Allen, the court had no such discretion, but instead was required to impose a five-year consecutive term for any person convicted of a serious felony who previously had been convicted of a serious felony. (*Ibid.*)

In *Garcia, supra*, 28 Cal.App.5th 961, Division Two held "it is appropriate to infer, as a matter of statutory construction, that the Legislature intended Senate Bill [No.] 1393 to apply to all cases to which it could constitutionally be applied, that is, to all cases not yet final when Senate Bill [No.] 1393 becomes effective on January 1, 2019." (*Id.* at p. 973.) We agree with the analysis and conclusion in *Garcia* and, as noted *ante*, the Attorney General correctly concedes that Senate Bill No. 1393 applies retroactively to nonfinal cases.

Moreover, "when the record shows that the trial court proceeded with sentencing on the . . . assumption it lacked discretion, remand is necessary so that the trial court may have the opportunity to exercise its sentencing discretion at a new sentencing hearing." (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 425 (*McDaniels*).) A remand is not required, however, if "the record shows that the trial court clearly indicated when it originally sentenced the defendant that it would not in any event have stricken [the

previously mandatory] enhancement." (*Ibid.*; see also *People v. Almanza* (2018) 24 Cal.App.5th 1104, 1110 [on rehearing, agreeing with *McDaniels*].)

The Attorney General contends remand is not necessary because "the trial court's statements at sentencing clearly indicated that it would not have stricken the enhancements in any event." Specifically, the Attorney General argues that if the trial court had wanted to impose a shorter term, it had other options available such as dismissing the other strike or the fifth prison prior enhancement.

It is a close call. The Attorney General is correct that the court considered and declined to impose an even lower term. However, the court also indicated that it had a "range of sentencing in mind," for the "value of this case." The record does not indicate whether 15 years was at the low, middle, or high end of that range. Unless the record contains a clear indication that the trial court would not have stricken one or both of the prior serious felony conviction enhancements if at the time of sentencing it had discretion to do so, remand is required. (See *McDaniels, supra*, 22 Cal.App.5th at p. 425.) Allen should be given an opportunity to argue to the trial court that it should exercise its informed discretion to strike one or both of these enhancements. We therefore remand for this purpose.

DISPOSITION

The judgment of conviction is affirmed. The matter is remanded for resentencing to allow the trial court to exercise its discretion in determining whether or not to impose one or both of the five-year enhancements under Penal Code sections 667, subdivision

(a)(1) and 1385, as amended effective January 1, 2019. We express no opinion on how the trial court should exercise such discretion.

NARES, Acting P. J.

WE CONCUR:

HALLER, J.

GUERRERO, J.